Supreme Court U.S.
FILED
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(3)

No. 01-1261

In The

Supreme Court of the United States

JULIE GRANDSON, ET AL.,

Petitioners,

v.

UNIVERSITY OF MINNESOTA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners Julie Grandson, Jennifer A. Thompson, Renata D. Lindahl, Ginger M. Jeffries, Alexandra L. Wongstrom and Paula Olson file this reply in order to correct misstatements of law and facts contained in Respondents' Brief in Opposition ("Opposition").

I. Petitioners Have Stated a Claim Against the University of Minnesota, Duluth For Intentional Discrimination Under Title IX

Quoting language from the lower court decisions, Respondents argue that Petitioners have failed to state a case against Respondent University of Minnesota, Duluth ("UMD"), for intentional discrimination against female student athletes in UMD's funding and operation of its intercollegiate athletic program. Opposition, p. 2 n. 3. That the lower courts found no intentional discrimination in the face of UMD's 20-year history of acknowledged non-compliance with Title IX serves to emphasize those courts' confusion over the proper standard for establishing intentional discrimination in the funding and operation of an intercollegiate athletic program – confusion which this Court now has an opportunity to resolve.

As set out on pages 4-15 of the Petition for a Writ of Certiorari, the summary judgment evidence establishes that UMD was well aware since at least the late 1970's that its athletic program failed to comply with Title IX, but failed to take any real steps to remedy that violation until *after* these lawsuits were filed, *after* the Office for Civil Rights ("OCR") had intervened,[1] and *after* the Office

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[1] Respondents suggest that UMD's settlement with OCR mooted Petitioners' claims. This Court rejected the same argument more than 20 years ago in *Cannon v. University of*

of Legislative Auditor of the State of Minnesota ("OLR") had begun an investigation that concluded that UMD had misused funds specifically appropriated by the Minnesota Legislature since 1979 to bring UMD's athletic program into compliance with Title IX.[2] The summary judgment evidence establishes that when these three events occurred in 1996/97, the highest officials at UMD had been aware for over 20 years that its athletic program discriminated against female athletes in violation of Title IX. Actual notice of UMD's violation of Title IX came

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Chicago, 441 U.S. 677 (1979) when it held that a private cause of action existed under Title IX regardless of whether an administrative proceeding had been instituted. This ruling is particularly applicable in cases like this one in which monetary damages are sought. OCR has no authority to award monetary damages or to in any way make Petitioners whole. The OCR's investigation and settlement with UMD confirms that UMD did indeed discriminate against its female student athletes in violation of Title IX during the time period relevant to this case.

[2] In footnote 3 of their Response, Respondents challenge Petitioners' statement, based on the OLR audit report, that UMD had "misused" legislatively appropriated funds. The audit report expressly concluded "we found no evidence that the University central administration ensured that UMD complied with the specific legal restrictions on the funding [that it be used for women's athletics]." CAP App. 268. The audit report also concluded that UMD's offer to return $68,663 of the misused funds was insufficient because "we have questioned additional cost allocation and budget practices of the UMD Athletics." CAP App. 287. OLR recommended that "the State Department of Finance should attempt to negotiate a resolution with the University about the questioned spending by UMD from the state special appropriation." CAP App. 289. The OLR audit was launched only after repeated complaints dating back to 1979 that UMD was misusing the special allocation for women's athletics to subsidize men's athletics. CAP App. 164, 191-94, 249-53, 304.

from students, women's groups and UMD's own employees. CAP App. 164-65, 167-68, 169, 185, 186, 195, 221, 232-35, 241. UMD's own officials repeatedly acknowledged that UMD's intercollegiate athletic program violated Title IX. CAP App. 164, 165, 196-207. Yet, UMD took no real steps to end gender discrimination in its athletic program until after it was forced to do so by these lawsuits, OCR's investigations and OLR's audit. Based on circumstances much less egregious than these, the Fifth Circuit held that Louisiana State University ("LSU") had intentionally violated Title IX by discriminating against female student athletes and was therefore subject to monetary damages. *Pederson v. Louisiana State University*, 213 F.3d 858, 880-81 (5th Cir. 2000). At the very least, the evidence in this case creates a fact issue regarding whether UMD intentionally discriminated against female student athletes. It certainly does not support the lower courts' conclusion, based on the misapplication of the standard announced for sexual harassment cases in *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998), that Petitioners failed to establish intentional discrimination as a matter of law.

II. Actions UMD May Have Taken to End Discrimination After These Suits Were Filed Is Not Relevant to Petitioners' Claims for Monetary Damages

UMD argues that it is now in compliance with Title IX, citing facts and figures from 1998-2001. Opposition, pp. 3-5. Even if true, UMD's assertion is irrelevant to Petitioners' claims for money damages. UMD's belated attempt to bring its athletic program into compliance with Title IX only after it was forced to do so by these lawsuits, the OCR's investigation, and the OLR's audit, came too late to benefit Petitioners and similarly situated

female athletes, all of which UMD concedes either graduated or otherwise became ineligible to participate in intercollegiate athletics by 1998.[3] Opposition, p. 6. Nor do any steps UMD may have taken to end gender discrimination only after it was forced to do so have any bearing on whether UMD intentionally discriminated against female athletes during the time period at issue. In *Pederson v. Louisiana State University*, the district court found that LSU had not complied with Title IX even though it had added two new women's teams during the period at issue, because LSU had not added those teams in response to increasing interests and abilities of its women students, but because the Southeastern Conference had required it to. "This Court finds that historically LSU has demonstrated a practice *not* to expand women's athletics at the university before it becomes absolutely necessary to do so." 912 F. Supp. 892, 916 (M.D. La. 1996), *aff'd in relevant part*, 213 F.3d 858 (5th Cir. 2000) (emphasis in original).

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[3] UMD argues that this Court does not have jurisdiction over the claims of Paula Olson and Alexandra Wongstrom, who Petitioners sought to add as plaintiffs in their amended complaint, because Petitioners did not object to that portion of the Magistrate Judge's order denying Petitioners' motion to amend to add Olson and Wongstrom. Opposition, p. 7 n. 11. UMD's argument is wrong for the simple reason that the Magistrate Judge did not address the joinder of Olson and Wongstrom as a separate issue, but expressly denied joinder for the same reasons he denied Petitioners' motion for leave to file an amended complaint, to all of which, Petitioners filed objections with the district court. UMD's waiver argument, therefore, has no merit. *Orthopedic Sports Injury Clinic v. Wang*, 922 F.2d 220, 225 (5th Cir. 1991) (party has no obligation to object to point not expressly addressed in Magistrate's report).

III. UMD's Entire 20-Year History of Knowing Violation of Title IX Should Be Considered

UMD attempts to shield from examination the first half of its 20-year effort to knowingly evade the requirements of Title IX by ignoring everything that happened before 1988. Opposition, pp. 3-5. UMD argues that its choice of 1988 as a benchmark year for Title IX compliance purposes is proper because that is the year Congress passed the Restoration Act overturning this Court's decision limiting the scope of Title IX. UMD Brief at 4 n. 2. This argument is without merit. The OCR has specifically stated that Title IX compliance is determined based on "the entire history of the athletic program." OCR Clarification of Intercollegiate Athletics Policy Guidance (1996), p. 5. Every court that has addressed an athletic program's compliance with Title IX has examined the history of the program from the enactment of Title IX. *See Cohen v. Brown Univ.*, 991 F.2d 888, 892 (1st Cir. 1993) (examining Brown's women's athletic program back to 1977); *Pederson v. Louisiana State Univ.*, 912 F.Supp. at 901 (examining female participation opportunities at LSU starting in 1977); *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 830 (10th Cir. 1993) (finding that Colorado State University could not demonstrate a history and program of expansion of women's athletics because the number of participation opportunities had decreased by 35% since 1977).

IV. A Clear Split in the Circuits Exists Regarding the Standard for Establishing Intentional Discrimination in the Funding and Operation of an Intercollegiate Athletics Program

UMD argues that no split in the circuits exists in determining when monetary damages can be awarded for

failure to comply with Title IX in the funding and operation of an intercollegiate athletics program because all circuits that have considered the issue agree that a showing of intentional discrimination is required. Opposition, pp. 7-10. UMD's argument begs the obvious question: What must a Title IX plaintiff show to establish intentional discrimination? In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), this Court held that money damages are available under Title IX if a showing of intentional discrimination is made. In *Gebser v. Lago Vista Ind. Sch. Dist.*, this Court resolved a split in the circuits over the showing necessary to establish intentional discrimination in a sexual harassment case by holding that a plaintiff must establish that she provided actual notice of the harassment to the educational institution and that the institute responded with conscious indifference. In *Pederson v. Louisiana State University*, 213 F.3d 881-82, the Fifth Circuit expressly rejected the *Gebser* standard for establishing intentional discrimination in a Title IX case involving the funding and operation of an intercollegiate athletic program. The Fifth Circuit held that LSU's long history of unequal treatment of female athletes constituted intentional discrimination even though it was based on outdated female stereotypes rather than on any discriminatory animus. *Id.* at 880-81 ("Appellees need not have intended to violate Title IX, but need only have intended to treat women differently").

In *Horner v. Kentucky High School Athletic Ass'n*, 205 F.3d 685 (6th Cir.), *cert. denied*, 531 U.S. 824 (2000), the Sixth Circuit followed the Fifth Circuit in rejecting the *Gebser* standard for identifying intentional discrimination in Title IX athletics cases, but in dicta adopted a discriminatory animus test contrary to the standard applied in *Pederson*. 205 F.3d at 692-93.

In this case, the Eighth Circuit ignored the holdings in both *Pederson* and *Horner* and applied the *Gebser* standard without analysis. Petitioners' App. at 11. Because the Eighth Circuit determined that each of the Petitioners had not individually provided actual notice to UMD of UMD's discrimination against that specific Petitioner, it concluded that under *Gebser*, Petitioners had failed to state a claim as a matter of law.[4] The split between the Fifth, Sixth and Eighth Circuits over the showing necessary to establish intentional discrimination in a Title IX intercollegiate athletics case is *exactly* the same type of lower court split the Court granted certiorari in *Gebser* to resolve. The Court should do the same in this case.[5]

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[4] In a class action, the Eighth Circuit's holding would require a showing that each class member had individually complained to the defendant institution about discrimination in the funding and operation of intercollegiate athletics. Such a result is clearly unworkable and has been rejected by the Court under analogous circumstances. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) (every member of plaintiff class need not have filed a prior individual claim with EEOC in order to state a claim for gender discrimination under Title VII).

[5] Respondents argue that in their briefing on appeal, Petitioners did not seriously challenge the applicability of the *Gebser* standard. Opposition at 11. Petitioners did not cite either the *Pederson* or *Horner* appellate court decisions in its initial brief to the Eighth Circuit, because that briefing was completed in July 1999, before either decision had been issued. In a letter submitted pursuant to Fed. R. App. P. 28(j), Petitioners brought the *Pederson* decision to the Eighth Circuit's attention and contended at oral argument that the court should determine whether UMD's conduct constituted intentional discrimination using the *Pederson* standard rather than the *Gebser* standard.

V. The Fifth Circuit Did Not Adopt and Petitioners Do Not Advocate a Discriminatory Animus Test

UMD asserts, incorrectly, that the Fifth Circuit in *Pederson* adopted a "discriminatory animus" test that is more rigorous than the standard adopted in *Gebser*. Opposition, p. 9. UMD then argues that if Petitioners could not meet the more lenient *Gebser* test, they could also not meet the discriminatory animus test. *Id.*, pp. 10-13. UMD's argument fails because the Fifth Circuit expressly *refused* to adopt a discriminatory animus test in *Pederson*.

The district court in *Pederson* had ruled that LSU's history of unequal treatment of female athletes was "not a result of intentional discrimination, but a matter of 'arrogant ignorance, confusion regarding the practical requirements of the law, and a remarkably outdated view of women and athletics which created the by-product of resistance to change'." 213 F.3d at 880. The Fifth Circuit forcefully rejected the notion that LSU's conduct did not constitute intentional discrimination because LSU did not understand that it was illegal:

> It bears noting that the provisions of Title IX and its attendant regulations are not merely hortatory; they exist, as does any law, to sculpt the relevant playing field. Consequently, Appellees' alleged ignorance of the law does not preclude our finding that LSU acted intentionally. Appellees need not have intended to violate Title IX, but need only have intended to treat women differently.

Id. at 880-81.

LSU argued that under the *Gebser* standard, "before a finding of intentional discrimination is warranted, [LSU] must have been aware that [it was] discriminating on the

basis of sex by not effectively accommodating the interests and abilities of its female student athletes. *Id.* at 882. The Fifth Circuit ruled that the *Gebser* standard was designed to determine whether educational institutions are aware of sexual harassment carried out by their employees and had no application to claims that a university had discriminated in the operation of its intercollegiate athletics program:

> In the instant case, it is the institution itself that is discriminating. The proper test is not whether it knew of or is responsible for the actions of others, but is whether Appellees intended to treat women differently on the basis of their sex by providing them unequal athletic opportunity, and, as we noted above, we are convinced that they did. Our review of the record convinces us that an intent to discriminate, albeit one motivated by chauvinist notions *as opposed to one fueled by enmity*, drove LSU's decisions regarding athletic opportunities, for its female students.

Id. (emphasis added). There is no basis for Respondents' assertion that the Fifth Circuit adopted a discriminatory animus standard.[6]

There is also no basis for Respondents' assertion that Petitioners cannot meet the standard applied by the Fifth Circuit. The evidence of UMD's 20-year history of

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[6] Two of the judges on the Sixth Circuit panel in *Horner v. Kentucky High School Athletic Ass'n* did, in dicta, suggest a discriminatory animus test for determining intentional discrimination in Title IX athletics cases. 206 F.3d at 696. The dissent rejected that standard as too strict. *Id.* at 698-706. Contrary to Respondents' suggestion, Petitioners do not advocate the adoption by this Court of a discriminatory animus test.

egregiously unequal treatment of male and female athletes is far more detailed and extensive than the evidence on which the Fifth Circuit based its holding:

> LSU appointed a low-level male athletics department staff member to the position of "Senior Women's Athletic Administrator," which the NCAA defines as the most senior women in an athletic department. LSU consistently approved larger budgets for travel, personnel, and training facilities for men's teams versus women's teams. The university consistently compensated coaches of women's teams at a rate far below that of its male team coaches.

Id. at 881. Under the Fifth Circuit's holding, Petitioners would have been allowed to proceed to trial.

Respectfully submitted,

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